STATE OF MICHIGAN
MICHIGAN SUPREME COURT

IN RE REQUESTING FOR ADVISORY
OPINION REGARDING
CONSTITUTIONALITY OF 2005 PA 71
/

SC: 130589

BRIEF OF MICHIGAN PROTECTION & ADVOCACY SERVICE, INC. AS AMICUS CURIAE

ORAL ARGUMENT REQUESTED

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INTRODUCTION

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. *Wesberry v. Sanders,* 376 US 1, 17-18, 84 S Ct 526 (1964).

Michigan's citizens, including citizens with disabilities, have the fundamental right to vote under both the United States and state constitutions. *See* U.S. Const. art. II, § 4. Citizens with disabilities are particularly vulnerable to limits and qualifications placed on the right to vote. The 2005 Commission on Federal Election Reform (the "Carter-Baker Commission") observed: "There are almost 30 million voting-aged Americans with some kind of disability – about 15 percent of the population. Less than half of them vote." *Commission on Federal Election Reform*, "Building Confidence in U.S. Elections," at 47 (2005). In considering the 2002 Help America Vote Act (HAVA), Congress recognized the unique barriers to voting faced by citizens with disabilities:

> The Senate Rules Committee received a great deal of disturbing testimony regarding the disenfranchisement of Americans with disabilities. Mr. James Dickson, Vice President of the American Association of People with Disabilities, testified that our nation has a `` ..... crisis of access to the polling places." Twenty-one million Americans with disabilities did not vote in the last election--the single largest demographic groups of non-voters. 148 Cong. Rec. (daily ed. 10/16/02), p. S10507, Sen. Dodd (D-CT).

The historical barriers keeping citizens with disabilities separated from their communities are amplified when state laws erect additional hurdles to be overcome in obtaining the benefits of citizenship. State voting laws – the state identification card, fee waiver provisions, and absentee ballot provisions – do not adapt well to the needs of citizens with disabilities. The photo identification statute at issue in this case is yet another barrier that uniquely restricts citizens with disabilities of all political persuasions from voting. As such, it should not pass constitutional muster.

THE PHOTO IDENTIFICATION REQUIREMENT AS CRAFTED IMPOSES AN UNCONSTITUTIONAL BURDEN ON VOTERS WITH DISABILITIES

1. Federal and state voting protections are co-extensive and depend on the character and magnitude of the burden on voters.

Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections. However, the burden imposed on individual voters is subject to scrutiny, the level of which is determined by the burden imposed by the law in question. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects-at least to some degree-the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze,* 460 US 780, 788, 103 S Ct 1564, 1569-1570, 75 L Ed 2d 547 (1983).

A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze,* 460 US 780, 789, 103 S Ct 1564, 1570, 75 L Ed 2d 547 (1983). The rigorousness of the inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.

Equal protection provisions of federal and state constitutions are coextensive. U.S. Const. amend. XIV, § 1, Const. art. I, § 2. *Shepherd Montessori Center Milan v. Ann Arbor Charter Tp.*, 259 Mich App 315 (2003). Equal protection is guaranteed under the federal and state

constitutions, U.S. Const amend XIV; Const. 1963, art I, § 2. *Frame v. Nehls,* 452 Mich 171, 183, 550 NW2d 739 (1996). Equal protection guarantees under the Michigan Constitution ensure that people similarly situated will be treated alike. *Yaldo v. Northpoine Ins. Co.,* 217 Mich App 615, 623, 552 NW2d 657, 660 (1996).

2. The photo identification requirement in MCL 168.523 fails to meet the "strict scrutiny" standard set forth by the U.S. Supreme Court in *Dunn v. Blumstein* and cited by the state Attorney General with regard to citizens with disabilities.

Strict scrutiny, under which a challenged state action will be upheld only if it advances a compelling state interest and is narrowly tailored to meet that interest, has generally been applied to equal protection claims: where the challenged action infringes on fundamental constitutional rights, such rights protected by the First Amendment. *Dunn v. Blumstein,* 405 US 330, 92 S Ct 995, 31 L Ed 2d 274 (1972).

Voting is recognized as one of the most fundamental rights under our state and federal constitutional structure. Strict scrutiny is applied in such cases because classifications that infringe on fundamental constitutional rights are presumptively invalid and will not often be justified by a legitimate state interest. *Donatelli v. Mitchell*, 2 F 3d 508, 513 (C.A.3, 1993). In *Reynolds v. Sims*, 377 US 533, 562, 84 S Ct 1362, 1381, 12 L Ed 506 (1964), the Court held that durational residence requirements which completely bar from voting all residents not meeting the fixed durational standards deprive certain citizens of "a fundamental political right, . . . preservative of all rights." In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' *NAACP v. Button*, 371 US 415, 438, 83 S Ct 328, 340, 9 L Ed 2d 405 (1963); *United States v. Robel*, 389 US 258, 265, 88 S Ct 419, 424, 19 L Ed 2d 508 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro v.*

Thompson, 394 US 618, 631, 89 S Ct 1322, 1329 (1969). And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' *Dunn v. Blumstein,* 405 US 330, 343, 92 S Ct 995, 1003 (1972). The right to vote has been recognized by this Court as a fundamental right guaranteed under the Constitution. *Michigan State UAW Community Action Program Council (CAP) v. Austin*, 387 Mich 506, 515-516, 198 NW2d 385, 388 (1972).

In *Carrington v. Rash*, 380 US 89, 85 S Ct 775 (1965), the Court rejected the 'conclusive presumption' approach to legislation addressing voter fraud as violative of the Equal Protection Clause. There, Texas argued that it was difficult to tell whether persons moving to Texas, while in the military service, were in fact bona fide residents. Thus, the State said, the administrative convenience of avoiding difficult factual determinations justified a blanket exclusion of all servicemen stationed in Texas. The presumption created there was conclusive-"incapable of being overcome by proof of the most positive character." *Heiner v. Donnan*, 285 US 312, 324, 52 S Ct 358, 360, 76 L Ed 772 (1932). The *Carrington* Court noted that although, many servicemen in Texas were not bona fide residents, and therefore properly ineligible to vote, many servicemen clearly were bona fide residents entitled to exercise their right to vote. In concluding that the statute was not narrowly tailored, the Court stated "since 'more precise tests' were available 'to winnow successfully from the ranks . . . those whose residence in the State is bona fide,' conclusive presumptions were impermissible in light of the individual interests affected. *Carrington, supra*, 380 US at 95, 85 S Ct at 780.

Not unlike the *Carrington* Court, in *Michigan State*, this Court noted that "the authority of the legislature to set up a system of voter registration is not in question . . . However, any law

passed pursuant to this constitutional authority does place a burden on the right to vote." *Michigan State, supra.* The Court reviewed a statute which called for the removal of a "certain class of otherwise qualified voters under Const. 1963, art. II, § 1, from the voting lists because of a failure to vote biennially or take other action required by the section," a statute which also used the 'conclusive' approach to legislation. The Court evaluated the statute using the strict scrutiny analysis and concluded that the State had to demonstrate a compelling state interest to justify a law passed pursuant to this section. *Id.*

In *Michigan State*, the State had proffered prevention of voter fraud as its compelling interest in requiring the removal of a certain class of voters from the voting list. The State contended that the statute insured that the voter rolls would not contain the names of voters who no longer lived at the listed addresses and would prevent other citizens from voting from such listed addresses. *Michigan State, supra, at* 389. This Court, citing to numerous decisions of the United States Supreme Court, noted:

> It cannot be doubted that the above section does to some extent accomplish this purpose, but that is not sufficient to demonstrate a compelling interest. A statute that impinges on a preferred right in order to solve a legitimate and compelling governmental need must be precise in its regulation . . . The State has the burden of demonstrating that the particular regulation is necessary and essential and not achievable by less drastic means . . . 'It must always be kept in mind that the power of a state to determine qualifications to vote must be exercised precisely and circumspectly so as to limit the franchise no more than is necessary to effectuate the state's interest. *Id.*

In concluding that the State of Michigan failed to meet its burden in establishing a compelling interest, the Court cited to the comprehensive set of safeguards enacted by the Legislature to prevent fraudulent voting. The Court found that the asserted purpose of law, in question, would be accomplished without the disqualification of tens of thousands of otherwise qualified registered voters. The Court held the State had failed to demonstrate a compelling state interest and the statute was unconstitutional under Const.1963, art. 2, § 1. *Id.* at 390.

The Michigan Attorney General issued an advisory opinion regarding the constitutionality of MCL § 523 of Michigan Election law contained in 1996 PA 583. The language contained in section 523 of 1996 PA 583 and § 523 in 2005 PA 71 are the same. The Attorney General applied the test set forth in *Michigan State* and found the statute unconstitutional. *OAG, 1997 No 6, 930 (January 29, 1997).* The asserted government interest was prevention of voter fraud. The Attorney General noted that no complaints regarding voter fraud were made to the its office and the statement by the then Secretary of State, Candice Miller, that there was a "lack of any real evidence of voter fraud" in Michigan.

The Attorney General then considered the "magnitude of the burden imposed" by the picture identification requirement for voting. "For the poor, those who do not drive, especially the elderly, the handicapped and those who, for whatever reason, do not possess a picture identification card, this requirement imposes economic and logistical burdens. If they do not obtain the picture identification card or sign the affidavit, they are denied the right to vote even though they are otherwise qualified to vote." *OAG No 6, 930, pp. 3.* The Attorney General concluded that in the absence of a showing of substantial voter fraud in Michigan, the picture identification restriction on the fundamental right to vote is not necessary to further a compelling state interest. In so doing, the Attorney General noted the numerous measures Michigan already engages in to prevent voter fraud, including criminal penalties for voter fraud, the state's voter registration list amongst other protections. In light of the fact that less drastic means were available to meet the iterated governmental interest, the Attorney General opined that the statute was unconstitutional since it violated the Equal Protection Clause of the Fourteenth Amendment.

The statute currently under consideration is no different from the statute analyzed by the Attorney General in Opinion 6930. To date, there has been no real evidence or history of voter

fraud in Michigan. The legislature did not conduct any hearings regarding this issue when MCL 168.523 was enacted in 1996 or the same law was included in 2005 PA 71. If no complaints of real voter fraud have made it to the attention of the Attorney General, the Secretary of State or the Legislature, the State has not set forth a compelling interest in enacting the legislation in question.[1]

Not unlike Georgia's photo identification requirement, Michigan's photo identification requirement does nothing to prevent voter fraud. In *Common Cause v. Billups*, the Court noted that the photo identification requirement did not apply to the voter registration requirement, and any citizen could register to vote without showing a photo identification. 406 F Supp 2d 1236, 1361 (N.D.Ga 2005). Similarly, in Michigan, voters can register to vote without presenting a photo identification. See MCLA. 168.509v[2], MCL 168.509r[3]. In addition, absentee ballots can be obtained without showing a photo identification. See MCLA 168.761. The absentee ballot law allows the clerk of a city, township, or village who receives an application for an absent voter ballot from a person registered to vote in that city, township, or village to issue such a ballot if the signature on the application agrees with the signature for the person contained in the qualified voter file or on the registration card. See MCLA 168.761.

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[1] The case at bar is quite different from that of *Munro v. Socialist Workers Party,* 479 US 189, 195-196, 107 S Ct 533, 93 L Ed 2d 499 (1986) the Court noted "legislatures ··· should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights"). See also *Indiana Democratic Party v. Rokita*, 2006 WL 1005037, 37 (S.D.Ind.,2006). Over ten years have lapsed without any history of voter fraud being noted by officials in state government, including the executive or legislative branch.

[2] MCL 168.509v states, in relevant part, "A person who is not registered to vote at the address where he or she resides may apply for registration by submitting a completed mail registration application."

[3] A person whose name does not otherwise appear in the qualified voter file shall be placed in the qualified voter file only if the person signs under penalty of perjury an application that contains an attestation that the applicant meets the requirements of MCL 168.509r.

Not unlike the situation in *Billups*, the photo identification requirement does not address the concerns regarding voter fraud that apparently warrant the state identification requirement in MCL 168.523. *Billups, supra, 406 F Supp at 1361.* The identification requirement is not narrowly tailored to serve its stated purpose of preventing voter fraud. In fact, the State has a number of significantly less burdensome mechanisms, written into law, that are available to prevent in-person voter fraud.

Michigan continues to have the requirement for the development and maintenance of a statewide qualified voter file and the legislature has outlined the steps that the Secretary of State has to undertake to maintain the statewide qualified voter registration file. *See* MCL 168.509m to 509x. MCL 168.509o states, in relevant part, "the secretary of state shall direct and supervise the establishment and maintenance of a statewide qualified voter file. The secretary of state shall establish the technology to implement the qualified voter file on or before January 1, 1997. The qualified voter file shall be the official file for the conduct of all elections held in this state on or after January 1, 1998." In addition, Michigan law provides:

> The inspectors of election at an election or primary election in this state, or in a district, county, township, city, or village in this state, shall not receive the vote of a person whose name is not registered in the registration book or listed on the computer voter registration precinct list of the township, ward, or precinct in which he or she offers to vote unless the person has met the requirements of section 507b. MCL 168.491

Michigan also continues to have laws that impose criminal sanctions on individuals for engaging in voter fraud. MCL 168.931- MCL 1680.942 set forth the criminal sanctions of engaging in voter fraud, the penalties for such offenses, the role of election officials, police and prosecutors. Sections 931, 932, 932a, 933 of the Michigan Election Law define the offenses that constitute criminal offenses. Section 932a makes it a felony, among other things, to "vote or attempt to vote under the name of another person."

In the absence of any real evidence of voter fraud, the picture identification restriction on the fundamental right to vote is not necessary to further a compelling state interest. Michigan has numerous less burdensome alternatives already in place to address any concerns regarding voter fraud. The law, as written, effectively acts to bar individuals who are otherwise qualified to vote from voting because they do not have a state identification card. The statute violates the First and Fourteenth Amendments of the United States Constitution.

3. The photo identification requirement in MCL 168.523 fails to meet the "medium scrutiny" standard set forth by the U.S. Supreme Court in *Burdick v. Takushi* with regard to citizens with disabilities.

The U.S. Supreme Court also set forth a "medium scrutiny" standard for evaluating voting restrictions and their constitutionality under the First and Fourteenth Amendments in *Burdick v. Takushi*, 504 US 428, 434, 112 S Ct 2059, 2064 (1992). Petitioner, a registered Honolulu voter, filed suit against state officials, claiming that Hawaii's prohibition on write-in voting violated his constitutional rights of expression and association. When the petitioner wrote to state officials inquiring about Hawaii's write-in voting policy, he received a copy of an opinion letter issued by the Hawaii Attorney General's Office stating that the State's election law made no provision for write-in voting. *Id.*, at 430, 112 S Ct at 2061. The Court found that Hawaii's interest in "avoid[ing] the possibility of unrestrained factionalism at the general election," provided "adequate justification for its ban on write-in voting" *Id.* In so doing, the Court set forth "a more flexible standard":

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burdens imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 433-34, 112 S Ct at 2059.

The *Billups* court also applied the *Burdick* analysis to the constitutionality of photo identification requirements, including their application to citizens with disabilities. The court acknowledged the evidence presented by the plaintiffs on the impact of the voter identification requirement on citizens with disabilities, finding:

> Several of the voters (who submitted affidavits) have physical or mental disabilities that make it difficult for them to travel to [a center to receive a photo identification], to walk for long distances, or to stand in line. ... Others have to rely on family members or friends for transportation, or cannot obtain transportation. ... Other voters had problems obtaining necessary information, such as birth certificates or valid driver's licenses from other states, required for issuing a photo identification card. 406 F Supp 2d at 1341.

The Court concluded:

> [T]he character and magnitude of the asserted injury to the right to vote is significant. Many voters who do not have driver's licenses, passports, or other forms of photographic identification have no transportation to a service center, have impairments that preclude them from waiting in often-lengthy lines to obtain licenses, or cannot travel to a service center... Many voters who are elderly, disabled, or have certain physical or mental problems simply cannot navigate the lengthy wait successfully. 406 F Supp 2d at 1362.

The Court distinguished its opinion from other courts that had upheld voter identification requirements, finding that "all of those cases involved identification requirements that allowed voters to show means of identification other than photo identification's." 406 F.Supp.2d at 1376-77; see *League of Women Voters v. Blackwell*, 340 F Supp 2d 823 (N.D.Ohio 2004); *Bay County Democratic Party v. Land*, 347 F Supp 2d 404 (E.D.Mich. 2004).

The proposed Michigan photo identification requirement would fail to meet the medium scrutiny standard for many of the same reasons set forth in *Billups*. The current state identification requirements state that an adult must produce one of the following: an original or certified birth certificate, a military identification, or a passport. In addition, an adult must

produce two from the following list: a foreign driver's license or birth certificate; a non-immigrant visa; a title or registration; a marriage license, divorce decree, or name change; a government or school identification (not prison identification); adoption or military records; or a driver education certificate. http://www.michigan.gov/documents/DE40_032001_20459_7.pdf (last visited 7/17/06; see copy attached). Michigan has 438 nursing homes and 4,590 adult foster care homes licensed to house up to 98,918 adults who cannot live on their own. http://www.michigan.gov/mdch/0,1607,7-132-27417_27655_27662-48075--,00.html (last visited 7/17/06) (nursing homes); http://www.michigan.gov/dhs/0,1607,7-124-5455_27716_27717-82231--,00.html (last visited 7/17/06) (adult foster care homes). Some people living in these facilities are elderly and some are not. Many of these people do not drive and do not have drivers' licenses. Many lack transportation and the ability to secure a photo identification, or may lack the physical stamina to avail themselves of the Secretary of State's photo identification application process. See Exhibit 1 for an example of diminished access to Secretary of State offices in one Michigan city. Others may lack the primary or secondary documents necessary to obtain a state identification, or may lack the necessary additional proof of residency required. See http://www.michigan.gov/sos/0,1607,7-127-1627_8668-106092--,00.html (last visited 7/17/06).

Many citizens with disabilities might be unable to sign or understand the written affidavit required as an alternative to presenting the photo identification as the statute requires. In addition, the current fee ($10) can act as a burden on adults who depend on Supplemental Security Income or other public assistance and receive little or no money to pay for more than the costs of living in their facilities. The fee waiver provision only comes into play for citizens with disabilities if they have previously been denied a driver's license, or had a license revoked

or suspended. See http://www.michigan.gov/sos/0,1607,7-127-1627_8668-76061--,00.html (last visited 7/17/06). Additional fees may be imposed for certified birth certificates, required as a primary source of identification for applying for a state identification card.

The federal Help America Vote Act (HAVA) includes a voter identification requirement, similar in purpose to that in the statute before the Court in this case, but very different in how it accommodates the needs of voters with disabilities. Representative Ney highlighted this difference in his remarks in the House:

> [The voter identification] provision does not require voters to present an actual photo identification. In recognition of the fact that some citizens do not have such an identification, the bill allows a voter a number of options to identify themselves, including a bank statement, utility bill or government check. 148 Cong. Rec. (daily edition 10/10/06), p. H7837, Rep. Ney (R-OH).

Senator Bond concurred:

> [The voter identification] provision is not discriminatory; the documents required for identification are widely available. The Department of Transportation statistics report that more than 90 percent of Americans of voting age have a drivers license. But to be certain no one will be negatively impacted, the conferees included carefully crafted and balanced identification requirements. The required pieces of identification include items widely available to all citizens, including the disabled, the poor, new citizens, students and minorities. 148 Cong. Rec. 10/16/02 (daily edition), p. S10490, Sen. Bond (R-MO).

The statute before this Court does not include the flexibility of accepting a variety of documents described in HAVA, when flexibility is necessary to meet the diverse needs of citizens with disabilities who intend to vote. In our own experience as representatives for youth with disabilities returning to their communities from the juvenile justice system upon reaching age 18, or for adults returning to the community from the correctional system, many lack the basic documents necessary to obtain a state identification and have trouble obtaining them. See Declaration of Stacy Hickox, Exhibit 2. These barriers would add to the unique barriers that

already exist for citizens with disabilities and would make it harder, not easier, for such citizens to vote.

Finally, the statute fails to include any requirement that the Secretary of State educate voters or even its own staff on voter identification requirements. Nor does the statute on its face authorize any appropriation in the state budget for specific training or outreach on the photo identification requirement. In a recent Ohio decision, the District Court found that a statewide systemic failure to train election workers raised legitimate substantive and procedural due process concerns. *League of Women Voters of Ohio v. Blackwell*, slip op. 2005 WL 3274844 at 6-7 (N.D.Ohio 2005). The *Billups* court noted that several means to remove barriers to obtaining photo identification's were not publicized, making them in effect unavailable to many people. 406 F Supp 2d at 1363-64. For citizens with disabilities, specific training includes how to accommodate voters with diverse disabilities in applying for the state identification, in executing the affidavit, or in responding to a challenge if brought.

In summary, the photo identification statute brings with it numerous barriers, barriers that may seem insignificant to many people, but are tremendous to citizens with disabilities. Taken together, these barriers significantly burden the right to vote and therefore invoke the medium scrutiny in *Burdick* and *Billups*.

4. The photo identification requirement in MCL 168.523 fails to meet the "rational basis" standard with regard to citizens with disabilities.

"Unless the discrimination impinges on the exercise of a fundamental right or involves a suspect class, the inquiry under the Equal Protection Clause is whether the classification is rationally related to a legitimate governmental purpose." *Frame, supra,* 452 Mich. at 183, 550 N.W.2d 739. Under rational-basis review, the challenged classification must be upheld "if there

is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Donatelli v. Mitchell*, 2 F.3d 508, 513 (C.A.3, 1993). A rational basis exists for the legislation when any set of facts, either known or that can be reasonably conceived, justifies the discrimination. *Crego v. Coleman,* 463 Mich 248, 259-260, 615 NW2d 218 (2000).

In this instance, the State cannot proffer any justification for engaging in discrimination on the basis of disability in the enacting the specific provisions of MCL 168.523. MCL 168.523 does not contain any of the alternatives present in other parts of Michigan's election law that are geared to assist individuals with disabilities to participate in the election process. Failure to have such protections contained within MCL 168.523 amounts to discrimination on the basis of disability in violation of the Equal Protection Clause of the U.S. Constitution. MCL 168.523 requires the voter to execute "an application showing his or her signature or mark and address of residence in the presence of an election official." MCL 168.754 requires inspectors to assist a voter, inside the voting booth, how to mark the ballot or mark the ballot as directed by the voter. No such assistance is written into MCL 168.523. MCL 168.736 requires an election inspector to ask an elector questions regarding his or her qualification to vote at that poll. MCL 168.523 does not allow for the oral administration of the application that has to be executed. MCL 168.751 states that if an elector "cannot mark his or her ballot, the elector shall be assisted in marking of his or her ballot by 2 inspectors of election," yet another protection which is absent from MCL 168.523. In fact, MCL 168.751 allows a voter who is blind to be assisted in the marking of his or her ballot by a member of his or her immediate family or by a person over 18 years of age designated by the blind person. There is no rational basis for failing to extend protections that exist in other provisions of Michigan's election law to MCL 168.523. Failure to extend such provisions to MCL 168.523 impact people with disabilities including populations

already identified in the other provisions, such as voters who are blind and individuals who cannot read.[4]

Given the purpose of the statute, the classification created in the statute, which unduly burdens the right of people with disabilities to vote, is arbitrary and unreasonable. There is no rational basis that the State can proffer for failing to include protections that would assist voters with disabilities to execute the application required under MCL 168.523. Hence, the statute violates the equal protection provisions of the state and federal constitutions.[5]

5. The photo identification requirement is a poll tax in violation of the 24th Amendment of the United States Constitution.

The 24th Amendment of the United States Constitution provides:

> "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV.

The Twenty-Fourth Amendment thus applies to elections for certain federal officials.

In *Harman v. Forssenius,* 380 US 528, 85 S Ct 1177, 14 L Ed 2d 50 (1965), the Supreme Court struck down a Virginia requirement that a federal voter either pay customary poll taxes as required for state elections or file a certificate of residence. The Supreme Court reasoned that the

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[4] See MCL 168.500

[5] Another District Court recently used the rational basis standard to uphold an Indiana photo ID requirement in *Indiana Democratic Party v. Rokita*, slip op. 2006 WL 1005037 (S.D.Ind. 2006). The *Rokita* opinion is inapplicable to the current matter before this Court for several reasons. First, the Court did not reach specific conclusions about the impact of the photo ID law on persons with disabilities, since it dismissed for lack of standing the only organizational plaintiff (Indiana Center for Independent Living) who was asserting those rights. (In dismissing IRCIL and other organizational plaintiffs, the Court declined to apply 6th Circuit precedent in voting cases – *Sandusky* and *Bay County, supra* – and opted instead to apply a narrower 7th Circuit standard.) Second, the Court invoked Indiana's absentee ballot statute as a basis for overcoming most of the hardship claims argued by the remaining plaintiffs. Unlike the Michigan statute, Indiana's absentee ballot provision has a specific exception which allows any person with a disability to apply for and receive an absentee ballot. *Compare* Ind.Code 3-11-4-2 with MCL 168.759. Finally, the Court in *Rokita* did not find that the record set forth in *Billups* was present with regard to the Indiana statute. Such a record is, of course, not present in a certified question before this Court.

requirement to file a certificate of residence imposed a material requirement solely upon those who refused to surrender their right to vote in federal elections without paying the poll tax, and, consequently, the requirement violated the 24th Amendment. 380 US at 541-42, 85 S Ct 1177. The Supreme Court stated:

> [T]he Twenty-fourth Amendment does not merely insure that the franchise shall not be "denied" by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be "denied or abridged" for that reason. Thus, like the Fifteenth Amendment, the Twenty-fourth "nullifies sophisticated as well as simple-minded modes" of impairing the right guaranteed.
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> ....
>
> The requirement imposed upon those who reject the poll tax method of qualifying would not be saved even if it could be said that it is no more onerous, or even somewhat less onerous, than the poll tax. For federal elections, the poll tax is abolished absolutely as a pre-requisite to voting, and no equivalent or milder substitute may be imposed. Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban. 380 US at 540-42, 85 S Ct 1177 (citations omitted; footnote omitted).

Similarly, in *Harper v. Virginia State Board of Elections,* 383 US 663, 86 S Ct 1079, 16 L Ed 2d 169 (1966), the Supreme Court struck down Virginia's poll tax requirement for state elections, finding that the poll tax violated the Equal Protection Clause:

> We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.
>
> ...
>
> Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context-that is, as a condition of obtaining a ballot-the requirement of fee paying causes an "invidious" discrimination that

runs afoul of the Equal Protection Clause. 383 US at 666-68, 86 S Ct 1079 (citations omitted).

In order to get a state identification in Michigan, the voter has to pay a $10 fee. See Exhibit 3. Moreover, in order to obtain the state identification, applicants have to present at least three forms or identification for proof of name and date of birth. See Exhibit 4. There are costs associated with obtaining the documents in the list provided by the Secretary of State. A certified birth certificate, for example, is not free. Most documents in the 'secondary group' also have to be "raised seal or be a true copy." Assuming the applicant with a disability is able to locate documents which qualify under the primary and secondary category of documents, the applicant still has to incur the costs of getting to and from a Secretary of State's office. Requiring those voters to purchase a photo identification card effectively places a cost on the right to vote, both directly and indirectly. In both respects, the photo identification requirement runs afoul of the 24th Amendment for federal elections and violates the Equal Protection Clause for state and local elections.

Although a fee waiver provision exists, it is truly an illusory provision. The language of the fee waiver provision states: "No fee will be charged for applicants 65 years of age or older, to individuals whose license has been revoked, suspended, or denied because of physical or mental disability, or to persons who are legally blind." *Id.* In order for an individual with a disability to get the fee waived, the fee waiver provision requires the person, at a minimum, to have applied for a driver's license and have been denied such a license. The fee for obtaining a driver's license is $25. See Exhibit 5. The procedures for ascertaining the nature of an individual's physical or mental disability is set forth in the administrative rules governing the Department of State. See Exhibit 6. If the Secretary of State staff have "reason to believe that

an applicant has a physical or mental disability which affects his or her ability to safely operate a motor vehicle, the department shall not process the application until a statement of physical or mental history has been received and reviewed." See Exhibit 7. The statement has to be provided by a professional physician or psychiatrist and the statement has to include information regarding diagnosis, onset, prescribed treatment, medications, the applicant's compliance with and response to treatment, any adverse reactions and results of the examination administered. MAC R257.853. Even a blind applicant has to submit "acceptable proof of legal blindness." See Exhibit 8. It is possible that some applicants may be able to navigate these requirements and obtain a waiver without charge, but the *Billups* court observed "the fact that some individuals avoid paying the cost for the Photo identification card does not mean that the Photo identification card is not a poll tax." 406 F Supp 2d at 1370. The Court concluded that even if the fee waiver affidavit option is realistically available for any voter who wishes to use that option, the fee waiver affidavit still runs afoul of the 24th Amendment. Relying upon the Supreme Court's decision in *Harman,* the *Billups* court concluded "any material requirement imposed upon a voter solely because of the voter's refusal to pay a poll tax violates the Twenty-fourth Amendment." *Id.*

If MCL 168.523 is enforced, voters who do not have other acceptable forms of State driver's license must obtain state identification cards to be able to vote in person at the polls. Furthermore, voters in Michigan who are unable to obtain photo identification cards for one reason or another are not free to vote via absentee ballot. Absentee ballots are only available to voters who are age 60 years old or older, unable to vote without assistance at the polls, expecting to be out of town on election day, in jail awaiting arraignment or trial, unable to attend the polls due to religious reasons, or appointed to work as an election inspector in a precinct outside of the

precinct of residence. Absentee ballot requests must be made in writing to local city or township clerks, and there is no statewide requirement that clerks provide assistance to voters with disabilities. In addition, most voters must vote in person once before becoming eligible to receive an absentee ballot; this requirement is waived for "handicapped" persons, but there is no guidance on what proof, if any, a person must submit in order to qualify as "handicapped" in the eyes of individual city or township clerks. See http://www.michigan.gov/sos/0,1607,7-127-1633_8716-21037--,00.html (last visited 7/18/06).[6]

Finally, the state's failure to provide training and outreach to voters and its staff makes both the fee waiver and absentee ballots of little use to most voters. In *Billups*, the Court reviewed the affidavit requirement that would permit an applicant for the photo identification to request a fee waiver. The Court noted that "many voters may not be aware of that policy, and understandably may be reluctant to sign an Affidavit that requires them to state that they are "indigent and cannot pay the fee for an identification card" when such a statement is not true. Additionally, many voters simply may be too embarrassed over their inability to afford a Photo identification card to request and complete an Affidavit for a free card." *Id.* at 1369. The State identification requirement imposes a poll tax on individuals with disabilities in violation of the 24th Amendment of the U.S. Constitution and violates the Equal Protection Clause with respect to state and municipal elections.

CONCLUSION

The photo identification requirement imposes a fundamental barrier to the right of voters who are otherwise eligible to vote--- a barrier that threatens to become an outright denial of the

[6] Compare the absentee ballot requirements under Michigan law to the Indiana law examined in the *Rokita* case. Under Indiana's absentee ballot law, a person with a disability automatically qualifies, though it is not clear what proof is required to establish disability status. See Footnote 5 *supra*.

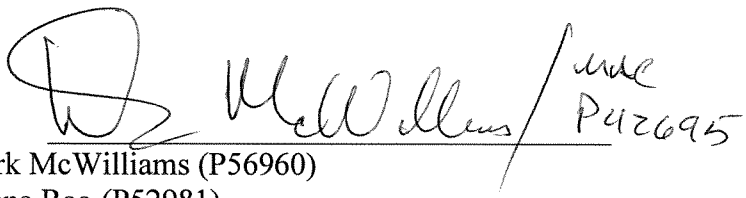
right to vote for those who cannot obtain a photo identification but all the while remain eligible to vote. The Court should find that MCL 168.523 is unconstitutional since it violates the state and federal constitutions.

Disability knows no political boundary or party affiliation. Requiring voters with disabilities to show photo identification which they may not have and may not easily obtain affects voters of all parties and seriously infringes on this most fundamental of American civil rights.

Respectfully submitted,

Dated: July 19, 2006

MICHIGAN PROTECTION AND ADVOCACY SERVICE, INC.

By: 

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